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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

VIRGINIA CAVINS, PROGRESSIVE SYSTEMS, INC.,
PETITIONERS

v.

NATIONAL UNION FIRE INSURANCE COMPANY; BILL G. CAVINS; COLORADO CASUALTY INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the United States Court of Appeals err in holding that petitioners, Virginia Cavins and Progressive Systems, Inc. were not properly parties to the appeal underlying this petition for writ of certiorari even though the Federal Rules of Appellate Procedure allow counsel representing more than one party to use generic designations, such as "et al.," in the caption or body of a timely-filed notice of appeal?

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OPINIONS BELOW

The following opinions and orders of lower courts are relevant to this petition:

1. Memorandum Opinion and Order of the U.S. District Court, Middle District of Alabama, Coody, J., May 25, 2006.

2. Opinion of the U.S. Court of Appeals, Eleventh Circuit entered on March 19, 2007.

3. Eleventh Circuit denial of Petition for Rehearing on April 23, 2007.

All unreported.

JURISDICTION

The United States Supreme Court has jurisdiction to review this matter on petition for writ of certiorari to the United States Court of Appeals, Eleventh Circuit. The Eleventh Circuit initially entered its opinion and order on March 19, 2007. A petition for rehearing by your petitioners herein was denied by the Eleventh Circuit on April 23, 2007. The United States Supreme Court has authority to review this decision of the Eleventh Circuit due to its inherent authority to finally construe and delimit the application of the Federal Rules of Appellate Procedure. See, e.g., Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988).

This Court has jurisdiction under 28 U.S.C. section 1254.

RELEVANT PROVISIONS INVOLVED

FEDERAL RULE OF APPELLATE PROCEDURE 3(C)(1)(A):

> Contents of the Notice of Appeal. (1) The notice of appeal must: (A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms "all plaintiffs," "the defendants," "the plaintiffs, A, B, et al.," or "all defendants except X";

FEDERAL RULE OF APPELLATE PROCEDURE 3(C)4:

> An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

STATEMENT

This petition for a writ of certiorari is brought before the United States Supreme Court alleging that the United States Court of Appeals, Eleventh Circuit erred in its ruling of March 19, 2007, holding that your petitioners Virginia Cavins and Progressive Systems, Inc. failed to appeal the judgment of the United States District Court, Middle District of Alabama, which judgment was entered on May 25, 2006. Jurisdiction in the District Court was based upon diversity of citizenship. In reaching its conclusion the Eleventh Circuit referred to the notice of appeal filed by petitioners

and concluded that petitioners had not properly given notice to respondent of their intention to appeal the District Court's ruling.

This petition for writ of certiorari is brought seeking relief from the ruling of the Eleventh Circuit in this regard. Petitioners allege that the notice of appeal gave both proper and timely notice of their intention to appeal the ruling of the district court pursuant to the clear language of Federal Rules of Appellate Procedure 3(c)(1)(a) and 3(c)(4). The cited rules of appellate procedure have been adopted in an effort to liberalize the requirements of pleading as respects notices of appeal, and, furthermore, are intended to avoid forfeitures arising from "technical" failures of pleading.

It is urged upon this honorable Court that the Eleventh Circuit Court of Appeals indeed erred in its ruling of March 19, 2007 and in its denial of petitioners' request for rehearing on this issue on April 23, 2007.

REASONS FOR GRANTING THE PETITION

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CONFLICTS WITH BOTH THE CLEAR LANGUAGE OF THE FEDERAL RULES OF APPELLATE PROCEDURE, RULE NO. 3, AND ALSO VIOLATES THE POLICY PURPOSES BEHIND THE ADOPTION OF THE REVISED RULES.

This petition grows out of the ruling of the Eleventh Circuit in the underlying appeal between Bill G. Cavins, Virginia Cavins , Progressive Systems, Inc. and respondent National Union Fire Insurance Co. The final opinion of the Eleventh Circuit is, of course, included in the Appendix to this petition. The specific issue before

this Court revolves around the Notice of Appeal filed by the Appellants, the Cavinses and Progressive Systems, Inc. In the Notice of Appeal, the parties were identified in the caption of the notice as "Bill G. Cavins, et al., Defendants." Bill G. Cavins was identified individually in the body of the Notice of Appeal, but the other appellants were not specifically named in the body of the notice. It is urged upon this Court that the Notice of Appeal gave sufficient and timely notice that not only Bill G. Cavins, but also Virginia Cavins and Progressive Systems, Inc. as well, sought appellate review in the Eleventh Circuit. In its attached opinion, the Eleventh Circuit ruled that the Notice of Appeal was not sufficient to give proper notice that either Virginia Cavins or Progressive Systems were appealing from the lower court, the United States District Court, Middle District of Alabama.

The clear language and mandate of Rule 3(c) of the Federal Rules of Appellate procedure has been violated by the Eleventh Circuit's ruling in this case. As was stated earlier in this petition, this petition presents a very narrow, yet crucial, issue before this Court. The United States Supreme Court is clearly the final arbiter and authority on the construction and meaning of the Federal Rules of Appellate Procedure. While the issue presented in this petition may be narrow, as between these parties, the issue has much broader implications for other parties struggling to comply with the revisions to Rule 3 adopted in response to this Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988).

In Torres, this Court made its disapproval of the then-existing construction of Rule 3(c) quite clear, noting that the "harshness" of the rule was more the result of legislative action and not the result of the judicial process. Torres, 487 U.S. at 318. Further, this Court indicated in

Torres that the federal judiciary should "liberally construe" the rules of appellate procedure to determine whether technical compliance with Rule3(c) had occurred. Torres, 487 U.S. at 317.

The text of Rule 3(c) of the Federal Rules of Appellate procedure is not in dispute as it existed at the time of the appeal giving rise to this petition. In relevant part, Rule 3(c) provides that a notice of appeal must "specify the party or parties taking the appeal by naming each one in the caption OR body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs,""the defendants,""the plaintiffs, A, B, et al.," or "all defendants except X." See, Fed. R. App. P. 3(c)(1)(a) (emphasis supplied.) The content of the Notice of Appeal filed by Virginia Cavins and Progressive Systems, Inc. is not disputed. Neither is the fact that Bill G. Cavins, Virginia Cavins and Progressive Systems were represented by the same attorney in the District Court and on appeal to the Eleventh Circuit. The decision of the Eleventh Circuit simply ignored the clear and plain language of Rule 3(c), and mandated a result that clearly was not within the contemplation of the current embodiment of Rule 3(c). Not only does the decision of the Eleventh Circuit do violence to Rule 3(c), but it also conflicts with decisions of other Circuit Courts of Appeal that have considered similar issues.

The Eleventh Circuit's opinion in this case conflicts with the rulings of other Circuit Courts of Appeal that have considered similar issues surrounding the amended version of Rule 3(c). For instance, the United State Court of Appeals for the Sixth Circuit considered a very similar dispute in the cases of Hehemann v. City of Cincinnati, 45 F.3d 430 (1994) 1994 WL 714387 [C.A.6 1994] In Hehemann, the Sixth Circuit was faced with an appeal

from an award of sanctions against an attorney by the District Court for the Southern District of Ohio. Hehemann, slip op. At 2. The sanction award was levied only against the plaintiff's attorney and not against the plaintiffs themselves. Thereafter, a Notice of Appeal was filed by the plaintiffs' attorney which provided in relevant part: "NOW COMES plaintiff, John Hehemann, by and through counsel . . . ." The defendant objected to the Notice of Appeal claiming that the notice failed to name the "appealing party." Hehemann, slip op. At 2. Clearly the attorney affected by the sanction award did not name herself specifically in the Notice of Appeal beyond the most generic description of "by and through counsel." Citing the Committee Comments to the revisions to Rule 3(c), the Sixth Circuit found that it was "objectively clear" that the attorney herself was appealing the sanction award as "she [was] the only person affected by the ruling appealed from." Hehemann, slip op. At 2. Based on the decision by the Sixth Circuit it is clear that a person need not be specifically named in a Notice of Appeal for an appeal to be perfected pursuant to revised Rule 3(c).

In Sather v. Commissioner of Internal Revenue, 251 F.3d 1168 (8th Cir. 2001), another similar case was considered and compliance with revised Rule 3(c) was found. In Sather, the Eighth Circuit was faced with a number of consolidated appeals from decisions of the Tax Court in related cases. The Notice of Appeal filed by the appellants named only "Larry L. Sather, Donor, et al.," and then listed separate docket numbers for each of the several cases which had been consolidated for trial in the tax court. No specific designation of each individual appellant was given in the notice. Sather, 251 F.3d at 1172. As in this case, the appellants in Sather sought to appeal a consolidated memorandum opinion and order and this was clearly reflected in the notice by the Sather

appellants and by the petitioners in this case. See, Sather, 251 F.3d at 1172-73. The Eighth Circuit found the Notice of Appeal to be sufficient to give the opposing party proper notice of the identity of appellants. Id.

In similar fashion, the United States Court of Appeals for the Fifth Circuit has considered the case of Ford v. Elsbury, 32 F.3d 931 (5th Cir. 1994). In the Ford case, the underlying litigation grew out of an explosion at a chemical plant and a resulting class action lawsuit by numerous plaintiffs. Although the class was uncertified at the time of the appeal to the Fifth Circuit, a notice of appeal was filed which identified the appellants in the caption as "Undray D. Ford, et al.," and in its body as the "Ford Plaintiffs." Ford, 32 F.3d at 933-34. Noting that during all proceedings before the District Court, the plaintiffs had been referred to as "the Ford plaintiffs," the Fifth Circuit found that there was sufficient notice to the opposing party that all plaintiffs of the uncertified class were appealing the District Court's denial of remand, among other things. Id. At 934. See, also Olenhouse v. Commodity Credit Corp., 42 F.3d 1560 (l0th Cir. 1994) (holding sufficient Notice of Appeal which designated certified class of farmers by use of "et al." in caption). Likewise, petitioners in the matter at bar have always been referred to in collective terms in the District Court.

The Fifth Circuit has also considered a case in which one of two individual plaintiffs was omitted from a Notice of Appeal filed before it. In Pope v. Mississippi Real Estate Comm'n, 872 F.2d 127 (5th Cir. 1989), this question was addressed even prior to the adoption of the revisions to Rule 3(c). In Pope a husband and wife sought to appeal certain rulings to the Fifth Circuit. However, the notice of appeal they filed named only "James William Pope, et al.," as the appealing party and also stated that the "plaintiffs" appealed as well. Pope, 872 F.2d at 129.

Holding that there was no mystery who could be included as appellants in this two-person case, the Fifth Circuit found that the case was distinguishable from the Torres decision and that the notice of appeal gave fair notice that not only James Pope but also Mary Pope properly appealed the decision of the district court. Id. At 129. Likewise, in the case at bar there were only three defendants and there can be no real mystery as to who was referred to as appellants by the use of "et al., Defendants" in the caption of the notice of appeal to the Eleventh Circuit. Cf., Gaston v. Ploeger, 2007 WL 1087281 (10th Cir. 2007)(Notice not sufficient where it mentioned 5 of 6 potential appellants by name in caption and body of notice but omitted a sixth "inadvertently, and failed to use "et al." in either caption or body of notice.)

A case on "all fours" with the matter at bar was considered by the United States Court of Appeals for the Seventh Circuit in Cleveland v. Porca Co., 38 F.3d 289 (7th Cir. 1994). It must be noted that Cleveland v. Porca Co. was decided in 1994, a time just following the adoption of the revisions to Rule 3(c). Cleveland, 38 F.3d at 293-94. Finding that the opposing party would suffer no prejudice by the application of amended Rule 3(c), the Fifth Circuit found that the notice of appeal filed by the appellants gave sufficient notice of the identity of the parties actually appealing. Specifically, the Fifth Circuit noted that the body of the notice contained the notification that the "plaintiffs" appealed the decision and that the caption of the notice referred to "Melvin Cleveland, et al., Plaintiffs v. Porca Company, et al., Defendants." This designation was found to constitute sufficient notice within the parameters of amended Rule 3(c). In this regard the Fifth Circuit noted:

Amended Rule 3(c) specifically provides for this

> form of notice stating: 'An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as 'all plaintiffs,' . . . 'the plaintiffs, A, B, et al.' The above notice was therefore clearly sufficient to satisfy Amended Rule 3(c). See, Dodgers BarAnd Grill, 32 F.3d at 1440.

Cleveland, 38 F.3d at 294.

In Dodgers Bar and Grill, Inc. V. Johnson County Bd. Of County Comm'rs, 32 F.3d 1436 (10th Cir. 1994), the use of "et al." to generically describe groups of appellants was once again considered and approved by the United States Court of Appeals for the Tenth Circuit. In Dodgers Bar and Grill, the appellants sought review of certain zoning restrictions in the Tenth Circuit. However, the notice of appeal that was filed by the appellants identified only "Dodgers Bar and& Grill, Inc., a corporation, d/b/a Bonita Flats Saloon, et al." in the caption and referred only to "Dodgers Bar & Grill, Inc., and the other individually named plaintiffs . . ." in the body of the notice. Dodgers, 32 F.3d at 1440. Noting that the notice of appeal would not be sufficient in keeping the decision in Torres, the Tenth Circuit found that the notice did in fact comply with the relaxed requirements of amended Rule 3(c). Id. Cf., Espinoza v. Dunn, 48 F.3d 1227 (9th Cir. 1995) (holding notice sufficient where there was a designation of only one of several appellants followed by "et al." in the caption and some other generic description in the body of the motion); Adkins v. Safeway Stores, Inc., 968 F.2d 1317 (C.A.D.C. 1992)(Prior to adoption of amended Rule 3 FRAP, disallowing "et al." designation of more than one appellant.) See, also, Meehan v. United Consumers Club Franchising, Inc., 312

F.3d 909 (8th Cir. 2002)(Holding that failure to use "et al." in the caption or body of notice was evidence of intent of non-named individuals not to appeal.)

It must be recalled that FRAP 3 (c) is different from other individual rules of federal appellate procedure. For example, there is no question that Rule 3 embodies, since its amendment, a relaxed standard of pleading. This is to be contrasted with Rule l5 of the Federal Rules of Appellate Procedure wherein, for example, a much more stringent standard applies to the designation of parties intending or attempting to appeal. See, Elkins Carmen v. Surface Transportation Bd., 176 F.3d 1144 (C.A.D.C. 1999); Cf., Healthtrust, Inc. V. Usher, 2001 WL 34082052 (6th Cir. 2001)(Pro Se litigant's notice of appeal is good only for himself and family members, if parties to proceeding.)

At least one Circuit Court of Appeals has held that it is sufficient notice to the opposing party to name one appellant in the caption of the notice and to designate other un-named appellants as "et al." parties to the appeal in the caption of the notice. See, Anderson v. AT&T Corp., 147 F.3d 467 (6th Cir. 1998); Young v. City of Cleveland, 221 F.3d 1337 (6th Cir. 2000). In Anderson, the caption of the notice of appeal stated that "Roberta E. Anderson, et al., Plaintiffs" were the appealing parties against "AT&T Corp., et al., Defendants." The body of the notice merely stated that the intended appellees and matters of appeal were the ruling in the "decision and order entered in favor of defendant AT&T Corp. and against plaintiffs Roberta E. Anderson, et al., on their motions for summary judgment entered in this civil action on the 26th day of November 1996." Anderson, 147 F.3d at 472-73. This language in the notice of appeal was held to include as appellants all plaintiffs in the district court, and all defendants, including those who were involuntarily

made parties by the district court's ruling that was appealed. Id. At 473. Likewise, Bill G. Cavins, "et al.," in this case indicated their intention to appeal from the district court ruling of March 25, 2006. This should have been sufficient notice to National Union that an appeal was perfected on behalf of all defendants in the district court proceedings and parties to the ruling being appealed.

Finally, it is clearly the intention of the rule at issue that strict pleading need not necessarily be applied in perfecting an appeal. By its clear terms, Rule 3(c) states that an appellant must be named in the "caption OR body" of the notice. See, FRAP 3(c)(1) (Emphasis supplied.) There is nothing unclear or ambiguous about the language cited above. The rule states a clear objective to be followed in drafting a notice of appeal to a federal appeals court. The names of all parties to the appeal must appear in either the caption or body of the notice of appeal. However, again relying on the clear language of the rule itself, a lawyer representing more than one party may designate multiple parties he represents by the use of such generic language as "et al." See, FRAP 3(c)(1).

In the matter at bar, several cogent issues are totally undisputed. These matters are not only undisputed at this point, but petitioners would submit forcefully, that these issues foreclose further debate on the question of whether the notice of appeal to the Eleventh Circuit in this case was sufficient to perfect an appeal by Virginia Cavins and Progressive Systems, Inc. These undisputed issues are as follows:

1. The notice of appeal was timely filed.
2. The notice of appeal was captioned as "Bill G. Cavins, et al., Defendants."

3. The same counsel represented Bill G. Cavins, Virginia Cavins, and Progressive Systems, Inc. in the district court, and on appeal to the Eleventh Circuit.

As Judge Farris correctly stated in his dissent to the majority opinion, the Defendants were in identical positions and "represented by the same counsel." Further, Judge Farris noted that FRAP 3(c)(1) clearly allowed an attorney representing "more than one party" to describe those parties with such terms as "et al." in the "caption or body" of the notice of appeal. See, Opinion in Cavins v. National Union, No. 06-13361 at p. 13. Judge Farris correctly noted the construction of Rule 3 to allow the naming of parties in either the "caption or body" of the notice. That is exactly what your petitioner did in this case. See, Id.

CONCLUSION

This petition presents a very narrow issue to the Court for resolution. Either FRAP 3(c)(1)(a) says what it says, or it doesn't. The clear language of the rule would allow a party to be omitted from the body but be named in the caption of a Notice of Appeal. Also, the rule would allow a party to be omitted from the caption of the notice but be properly named in the body of the notice. Clearly, this was the intention of the amendment to Rule 3; to allow flexibility in pleading and to avoid inadvertent forfeitures by lack of strict adherence to technical rules. Further, that is exactly the reason why attorneys representing more than one party were allowed to designate multiple parties they represent by using terms such as "et al." in the caption or body of the notice.

Under the Eleventh Circuit's formulation of Rule

3(c)(l)(a), counsel representing multiple parties do not get the benefit of the revisions and amendments to Rule 3. Clearly, the notice of appeal stated in its caption that the defendants were "Bill G. Cavins, et al." Under the Eleventh Circuit's ruling in this matter, counsel would be required to specifically name each party in the body of the notice or its caption even though the same counsel represented all defendants in the appeal and at the district court level. Such a ruling is clearly in conflict with the amended version of Rule 3 which allows counsel representing more than one person to designate additional parties by the use of terms such as "all plaintiffs," or "all defendants," or "et al." In sum, the Eleventh Circuit opinion and ruling in this case represents an unwarranted and improper insistence on technical form. While the Eleventh Circuit may have preferred the previous formulation of Rule 3, it cannot insist that counsel must go beyond what the current version of the rules of appellate procedure call for.

It is clear that the current version of Rule 3 allows counsel to designate parties in either the caption or body of a notice of appeal. The Eleventh Circuit's ruling in this case is logically inconsistent with that fundamental concept embodied in the revisions to Rule 3. To uphold the Eleventh Circuit's ruling in this matter would simply be to emphasize that counsel representing multiple parties do so at their peril, and, thus, counsel must comply with the holding in Torres, even though Torres has been superseded by the amendments to Rule 3.

For the reasons stated, petitioners request that the Court grant this petition for writ of certiorari and reverse the holding of the Eleventh Circuit stating that Virginia Cavins and Progressive Systems failed to appeal the underlying order of the district court.

RESPECTFULLY SUBMITTED

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No. 06-13361

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NATIONAL UNION FIRE INSURANCE COMPANY,

Plaintiff-Appellee,

versus BILL G. CAVINS,

Defendant-Appellant,

VIRGINIA CAVINS, PROGRESSIVE SYSTEMS, INC.,

Defendants,

COLORADO CASUALTY INSURANCE COMPANY, Interested Party-Appellant.

March 19, 2007, Decided

March 19, 2007, Filed

NOTICE: NOT FOR PUBLICATION

JUDGES: Before CARNES, PRYOR and FARRIS, * Circuit Judges. FARRIS, Circuit Judge, concurring and dissenting in part.*

OPINION

PER CURIAM:

The main issue in this appeal is whether, under Ohio law, a party who seeks indemnification under an express contract and fails to satisfy the three requirements of *Globe Indemnity Co. v. Schmitt*, 142 Ohio St. 595, 53 N.E.2d 790, 794 (Ohio 1944), may recover attorney's fees incurred in litigation that settled. National Union Fire Insurance Company sought from Bill Cavins, Virginia Cavins, and Progressive Systems contractual indemnification for money paid in a settlement and attorney's fees incurred in the underlying litigation. The magistrate judge ruled that, because National Union failed to satisfy the requirements of Globe Indemnity, National Union could not recover the moneys paid in settlement but the magistrate judge awarded National Union indemnification for the attorney's fees based on an unpublished decision of an Ohio court of appeals. We conclude, based on an opinion of the Supreme Court of Ohio that neither party cited to either this Court or the magistrate judge, that National Union was not entitled to indemnification for the attorney's fees. We reverse the award against Bill Cavins, who was the only judgment debtor to appeal that award.

I. BACKGROUND

In 1988, Bill Cavins entered a Distributor Agreement with The Kirby Company. The agreement included the following indemnification provision:

Distributor shall indemnify the Company, its employees, agents and servants and hold the Company and its said employees, agents and servants harmless from any and all liability, damage, or expense incurred by it in connection with any claim, demand or suit based

on Distributor's acts or omissions, including alleged negligence; provided, however, that the Company shall (1) give Distributor prompt written notice of any such claim, demand or suit, and (2) provide the Distributor with every reasonable assistance which the Distributor may request in resisting such claim, demand or suit. The foregoing indemnification shall not apply if the Company is found guilty of any negligence, misconduct or wrongdoing in connection with any such claim, demand or suit.The agreement also specified that it "shall be construed under and governed by the law of the State of Ohio." In 1996, Bill Cavins assigned the agreement to Progressive, a corporation owned by Bill Cavins and his wife, Virginia Cavins. The Cavinses and Progressive sold vacuum products manufactured by The Kirby Company.

Between 1998 and 2001, nearly 100 lawsuits were filed in Alabama state courts against the Cavinses, Progressive, and The Kirby Company. National Union defended The Kirby Company in these lawsuits. Eventually, the lawsuits settled based on an agreement in which the Cavinses and Progressive paid more than $ 1 million through their insurer Colorado Casualty Insurance Company. The Kirby Company paid $ 830,550 through National Union.

The Kirby Company assigned its rights to indemnity under the agreement to National Union, which filed a complaint in federal district court based on diversity jurisdiction against the Cavinses and Progressive. National Union sought indemnification of the $ 830,550 paid in settlement and $ 748,462.75 of attorney's fees. The parties consented to the jurisdiction of a magistrate judge.

National Union moved for summary judgment, and the magistrate judge denied the motion. The magistrate judge reasoned that, under Ohio law, a party who seeks indemnification for money paid in settlement must meet the three requirements established by the Supreme Court of Ohio in *Globe Indemnity*, 53 N.E.2d at 794. The magistrate judge concluded that National Union failed to meet the requirements.

National Union then moved to alter or amend the order of the magistrate judge. National Union argued that, "even if the court correctly applied Globe [Indemnity] to the . . . funds paid in settlement, under the Ohio [court of appeals] opinion of *Ozko, Inc. v. Isaacson Constr., Inc.*, [No. 17078, 1995 Ohio App. LEXIS 5085, 1995 WL 678548 (Ohio Ct. App. Nov. 15, 1995),] National Union is entitled to recover attorney's fee[s]." National Union argued that, under Ozko, the requirements of Globe Indemnity do not apply to indemnification for attorney's fees incurred in litigation that settled. The magistrate judge denied the motion, but then certified the question to the Supreme Court of Ohio. The Supreme Court of Ohio declined to answer the certified question.

The magistrate judge relied on Ozko and awarded National Union indemnification for the attorney's fees incurred. On May 25, 2006, the magistrate judge entered a judgment against the Cavinses and Progressive and awarded National Union $ 748,462.75. Bill Cavins and Colorado Casualty then filed a notice of appeal.

II. STANDARD OF REVIEW

We review de novo both a grant of summary judgment, *Stephens v. Tolbert*, 471 F.3d 1173, 1175 (11th Cir. 2006), and the determination of state law, *Price v. Time, Inc.*, 416 F.3d 1327, 1334 (11th Cir. 2005).

III. DISCUSSION

To decide this appeal, we must resolve two matters: first, whether we have jurisdiction over all the purported appellants named in the initial brief; and second, whether National Union is entitled to indemnification from any appellant for the attorney's fees incurred in the state court litigation that settled. We address each issue in turn.

A. We Have Jurisdiction Over the Appeal of Only Bill Cavins.

In the initial brief, Bill Cavins, Virginia Cavins, and Colorado Casualty purport to be appellants, but the notice of appeal named only Bill Cavins and Colorado Casualty. It is "abundantly clear that a timely and properly filed notice of appeal is a mandatory prerequisite to appellate jurisdiction." *Holloman v. Mail-Well Corp.*, 443 F.3d 832, 844 (11th Cir. 2006). We asked the parties for simultaneous letter briefs addressing whether Virginia Cavins, who was not named in the notice of appeal, and Colorado Casualty, which was not a defendant before the magistrate judge, are properly appellants.

The parties agree that Colorado Casualty is not a party, but disagree about Virginia Cavins. National Union contends that neither Virginia Cavins nor Colorado Casualty are properly appellants. The Cavinses concede

that Colorado Casualty is not properly an appellant, but they assert that Virginia Cavins was "inadvertently left off of the Notice of Appeal" and should be considered a proper appellant. In their supplemental letter brief, the Cavinses contend without explanation or citation to supporting authority that "[t]he proper appellants are Bill G. Cavins, Virginia Cavins[,] and Progressive Systems, Inc."

Because neither Virginia Cavins nor Progressive were named in the notice of appeal, we must determine whether an "intent [by them] to appeal is 'objectively clear' from all of the circumstances." Id. Although Federal Rule of Appellate Procedure 3(c)(1)(A) requires that the notice of appeal "specify the party or parties taking the appeal by naming each one," Rule 3 was amended in 1993 to instruct that "[a]n appeal . . . not be dismissed . . . for failure to name a party whose intent to appeal is otherwise clear from the notice," Fed. R. App. P. 3(c)(4). The Advisory Committee explained that "[t]he test established by the [amended] rule . . . is whether it is objectively clear that a party intended to appeal." Fed. R. App. P. 3 advisory committee's note.

Nothing in the notice of appeal makes it "objectively clear" that Virginia Cavins and Progressive intended to appeal. Although the caption of the notice of appeal reads "Bill G. Cavins, et al.," the notice states twice in the body of the filing that the appellants are Bill Cavins and Colorado Casualty. The notice may be ambiguous as to the intent of Virginia Cavins and Progressive to appeal, but it is far from objectively clear. The assertion that Virginia Cavins was "inadvertently left off" of the notice of appeal is not relevant to what the notice

objectively conveys. Virginia Cavins and Progressive also "did not file any [other] document or series of documents that indicated [they] sought to appeal." *Holloman*, 443 F.3d at 844. Neither the initial brief filed in this appeal, which purports to be on behalf of Virginia Cavins, nor the supplemental letter brief, which asserts that Virginia Cavins and Progressive are proper appellants, "serve[s] as effective notice of [an] intent to appeal [by Virginia Cavins and Progressive], because [those documents were] not filed until after the deadline for filing [a] notice of appeal." *Id.* at 844-45.

We have jurisdiction over the appeal of only Bill Cavins. The parties concede that the appeal of Colorado Casualty must be dismissed for lack of jurisdiction. See *Wolff v. Cash 4 Titles*, 351 F.3d 1348, 1354 (11th Cir. 2003) ("Generally, one not a party lacks standing to appeal an order in that action." (internal quotation marks omitted)). Because Virginia Cavins and Progressive never filed a notice of appeal, they have no appeal to dismiss.

B. National Union Was Not Entitled to Indemnification from Bill Cavins for the Attorney's Fees Incurred in the State Court Litigation That Settled.

Bill Cavins contends that the magistrate judge erred when he relied on the unpublished decision of an Ohio court of appeals in Ozko and awarded National Union the attorney's fees incurred in the state court litigation that settled. Cavins asserts that the magistrate judge should have followed a different unpublished decision of an Ohio court of appeals, *Blair v. Mann*, No. 98CA35, 1999 Ohio App. LEXIS 1630, 1999 WL 228265 (Ohio Ct.

App. Apr. 8, 1999). Cavins argues that, under Blair, the requirements of Globe Indemnity barred National Union from recovering the attorney's fees incurred. We agree with the result advocated by Cavins, but do not rely upon the case law he cites.

As a preliminary matter, neither *Blair* nor *Ozko* are controlling authority in this circumstance. Until several years ago, an unpublished decision of an Ohio court of appeals was controlling authority only as to the parties to the decision and persuasive authority only in the district in which the decision was rendered. Ohio Sup. Ct. R. for Reporting of Ops. 4 commentary. Effective May 1, 2002, "designations of, and distinctions between, 'controlling' and 'persuasive' opinions of the courts of appeals based merely upon whether they have been published in the Ohio Official Reports [we]re abolished." Ohio Sup. Ct. R. for Reporting of Ops. 4. Both Blair and Ozko were decided before the amendment of the rule.

Our goal in "deciding a state law issue is to resolve it the same way the state's highest court would." *Price*, 416 F.3d at 1334. "Where the state's highest court has not spoken to an issue, a federal court 'must adhere to the decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise.'" *Ernie Haire Ford, Inc. v. Ford Motor Co.*, 260 F.3d 1285, 1290 (11th Cir. 2001) (quoting *Ins. Co. of N. Am. v. Lexow*, 937 F.2d 569, 571 (11th Cir. 1991)). We are "bound by this rule whether or not [we] agree[] with the reasoning on which the state court's decision is based or the outcome which the decision dictates."

Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 690 (11th Cir. 1983).

In Globe Indemnity, the plaintiff sought indemnification in common law tort for money paid in settlement. The Supreme Court of Ohio held that "the one seeking indemnity, after making voluntary settlement, must prove that he has given proper and timely notice to the one from whom it is sought, that he was legally liable to respond and that the settlement effected was fair and reasonable." *Globe Indemnity*, 53 N.E.2d at 794. National Union concedes that it cannot satisfy two of the three requirements of Globe Indemnity.

The circumstances here differ from those of *Globe Indemnity* in two important respects. First, National Union sought indemnification under an express contract, not implied indemnity arising from a common law tort. Second, National Union was awarded indemnification for the attorney's fees incurred in litigation that settled, not the money paid in settlement. We must then consider whether the requirements of Globe Indemnity apply to an action for indemnification brought under a contract and whether the requirements apply to indemnification for attorney's fees incurred in litigation that settled. The magistrate judge commendably sought guidance by certifying a question to the Supreme Court of Ohio, but that certification was unfortunately not accepted.

A decision of the Supreme Court of Ohio, which the parties failed to cite to this Court or the magistrate judge, squarely resolves the question whether the requirements of Globe Indemnity apply to indemnification for attorney's fees incurred in tort

litigation that settled. In *New York Central Railroad Co. v. Linamen*, 171 Ohio St. 87, 167 N.E.2d 778 (Ohio 1960), the Supreme Court of Ohio applied the requirements of Globe Indemnity to indemnification for attorney's fees incurred in litigation that settled. The plaintiff in Linamen sought indemnification in common law tort for the "loss suffered . . . in payment of [a] settlement . . . plus expenses and attorney fees," and the supreme court refused to award indemnification for either the moneys paid in settlement or the related fees because the plaintiff had failed to satisfy two of the three requirements of Globe Indemnity. *Id.* at 779 (emphasis omitted).

The question that remains is whether the requirements of both Globe Indemnity and Linamen apply to an action for indemnification brought under an express contract. Although the Supreme Court of Ohio has not spoken to the issue, the question is answered by an unpublished decision of an Ohio court of appeals that was decided after May 1, 2002, and that decision is controlling authority. In *Lubrizol Corp. v. Michael Lichtenberg & Sons Constr., Inc.*, 2005 Ohio 7050, 2005 WL 3610468 (Ohio Ct. App. 2005), the court of appeals applied the requirements of Globe Indemnity to an action for indemnification brought under a contract.

In the light of *Linamen* and *Lubrizol*, National Union was not entitled to indemnification for the attorney's fees incurred in the state court litigation that settled. The magistrate judge erred in awarding attorney's fees to National Union. We reverse with respect to Bill Cavins, the only judgment debtor who has appealed.

IV. CONCLUSION

The appeal of Colorado Casualty is DISMISSED for lack of jurisdiction, and the summary judgment against Bill Cavins is REVERSED.

CONCUR BY: FARRIS (In Part)

DISSENT BY: FARRIS (In Part)

DISSENT

FARRIS, Circuit Judge, concurring and dissenting in part:

I am pleased to join my brothers in this matter. Except that in my view we have jurisdiction over Virginia Cavins' appeal. Federal Rule of Appellate Procedure 3(c)(4) states that "failure to name a party whose intent to appeal is otherwise clear from the notice [of appeal]" does not require dismissing the appeal. Bill and Virginia Cavins were in identical positions, represented by the same attorney, and victory on appeal for only one of them would be of significantly less value. These factors indicate that Virginia Cavins' intent to appeal was "otherwise clear."

Rule 3(c)(1)(A) states that "an attorney representing more than one party may describe those parties with such terms as . . . 'the plaintiffs A, B, et al.'" in the notice of appeal's "caption or body." Bill and Virginia Cavins shared an attorney, who captioned the notice "National Union Fire Insurance Company, Plaintiff, v. Bill G. Cavins, et al., Defendants." It might have been more prudent if he had remembered that wise counsel always "dots all i's and crosses all t's." He could have listed the appellants by name. He didn't. For whatever

it is worth, a third of the panel does not conclude that his failure to do so was fatal to Virginia Cavins' appeal.

Footnotes

*Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

CIVIL ACTION NO. 2:03cv878-C (WO)

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

NATIONAL UNION FIRE INS. CO. OF PITTSBURGH, PA.,
Plaintiff

v.

BILL G. CAVINS, et al.,
Defendants

March 9, 2006, Decided
March 9, 2006, Filed

JUDGES: CHARLES S. COODY, CHIEF UNITED STATES MAGISTRATE JUDGE

OPINION BY: CHARLES S. COODY

MEMORANDUM OPINION AND ORDER

In this case, National Union Fire Insurance Company of Pittsburgh ("National Union") seeks indemnification from defendants Bill and Virginia Cavins ("Cavins") and Progressive Systems, Inc. ("Progressive") for expenses incurred as a result of settling 91 underlying state court claims against its insured, The Kirby Company ("Kirby"). National Union contends that it is due indemnification for expenses including attorney's fees

in the amount of $ 748,462.75.

The court has jurisdiction of this action pursuant to its diversity jurisdiction. *See* 28 U.S.C. § 1332. Pursuant to 28 U.S.C. § 636(c)(1) and M.D. Ala. LR 73.1, the parties have consented to the United States Magistrate Judge conducting all proceedings in this case and ordering the entry of final judgment.

This court previously denied the plaintiff's motion for summary judgment on the grounds that National Union failed to demonstrate that it was entitled to judgment as a matter of law because it has failed to present any facts regarding whether the defendants received timely and proper notice of the settlements; whether Kirby was legally liable in the underlying lawsuits; and whether the underlying settlements were reasonable and fair as required by Ohio law. *See* Doc. # 45.

National Union has since conceded in open court that because it cannot meet its burden regarding the underlying settlements pursuant to *Globe Indemnity Co. v. Schmitt*, 142 Ohio St. 595, 53 N.E.2d 790, 794 (Ohio 1944), it cannot recoup $ 830,550.00 paid in settlement of those lawsuits.

At this juncture, the sole remaining issue for the court is whether National Union, as a party to the indemnity agreement that requires indemnification for expenses incurred in the defense of certain claims brought by third parties, may recover attorney fees incurred in defending such a claim from the defendants, when, pursuant to *Globe, supra*, under Ohio law, National Union is prohibited from recovering amounts paid in settlement of the claim. [1]

STATEMENT OF FACTS

On or about September 29, 1988, Bill G. Cavins (hereinafter referred to as "Cavins") entered into a "Distributor Agreement" with The Kirby Company (hereinafter referred to as "Kirby"). The agreement specified that Cavins was an independent contractor authorized to distribute Kirby products. The Distributor Agreement contains, among other things, an indemnification provision which provides:

10(b) Distributors Indemnification: Distributor shall indemnify the Company, its employees, agents and servants and hold the Company and its said employees, agents, and servants harmless from any and all liability, damage or expense incurred by it in connection with any claim, demand or suit based on Distributor's acts or omissions, including alleged negligence; provided, however, that the Company shall (1) give Distributor prompt written notice of any such claim, demand or suit, and (2) provide the Distributor with every reasonable assistance which the Distributor may request in resisting such claim, demand or suit. The foregoing shall not apply if the Company is found guilty of any negligence, misconduct or wrongdoing in connection with any such claim, demand or suit.

On or about February 16, 1996, Cavins assigned the Distributor Agreement to Progressive Systems, Inc. (hereinafter referred to as "Progressive"), a corporation that Bill Cavins and/or Virginia Cavins principally owned. Thereafter, Bill Cavins, Virginia Cavins, and Progressive (hereinafter referred to as "the Defendants"), sold vacuum cleaner systems, parts, or both which were manufactured by Kirby. In the course

of these sales, the Defendants assisted the purchasers in obtaining financing for vacuum cleaners purchased by individuals who were unable to pay cash. As an independent contractor, Cavins retained control of his business operations, including the right to select which financing options he offered purchasers.[2] Cavins testified that Kirby did not control the price Progressive charged customers for vacuums; Kirby had no control over any aspect of Progressive's sales practices; Kirby did not control Progressive's day-to-day operations; and Kirby had no control over Progressive or Cavins' distributorship premises.

Subsequently, many of the purchasers filed suits and made claims (hereinafter collectively referred to as the "underlying actions") against the Defendants, Kirby, and others, alleging that the defendants in the underlying actions misrepresented the nature of the financing agreement offered. All of the plaintiffs purchased vacuum cleaners pursuant to open-end, revolving accounts with high interest rates. The purchasers/plaintiffs claimed that during the sales process, they were led to believe their accounts could be paid within a stated amount of time by paying a stated monthly payment, when in fact, the suggested amount was not nearly enough to pay off the debt due to the high interest rates on the accounts. The underlying state court actions included claims of fraud, negligence, wantonness, misrepresentation, and conspiracy to defraud.

National Union Fire Insurance Company of Pittsburgh, PA (hereinafter "National Union") defended Kirby in the underlying actions. Kirby subsequently settled 91 lawsuits for a total of $ 830,550.00. (Pl's Ex. F attached

to Mot. for Summ. J., Affidavit of Bill Daniels, at p. 2, P 3.) National Union incurred a reported $ 748,462.75 in attorney's fees while defending Kirby. (*Id.* at P 5). Pursuant to the indemnification provision of the Distributor Agreement quoted above, Kirby demanded that the defendants defend and indemnify it in the underlying actions. The parties agree that the Distributor Agreement remained in full force and effect at the time the underlying actions arose. Cavins' liability insurance carrier, Colorado Casualty, denied Kirby's demand for defense and indemnification as the plaintiffs in the underlying action made independent allegations of misconduct and resultant tort liability against Kirby. At all times during the underlying actions, Kirby denied liability to the plaintiffs and, in this action, maintains that it is not guilty of any misconduct, negligence, or wrongdoing regarding the individual plaintiffs.

DISCUSSION

The law in Ohio is well-established that when the party claiming the benefit of the indemnity agreement is unable to prove that the party from whom indemnity is claimed received proper and timely notice of the settlement, that it was legally liable to third parties, and that the settlement effected was fair and reasonable, the party is prohibited from recovering amounts paid in settlement of the claim. *See Globe*, 53 N.E.2d at 794. *See also Convention Center Inn, LTD v. Dow Chemical Co.*, 70 Ohio App. 3d 243, 590 N.E.2d 898, 900, 8 Anderson's Ohio App. Cas. 335 (Ohio Ct. App. 1990) *quoting Globe, supra. See also Blair v. Mann*, 1999 Ohio App. LEXIS 1630, 1999 WL 228265, *2 (Ohio Ct. App. 1999)(No. 98CA35); *Ozko, Inc. v.*

Isaacson Construction, Inc., 1995 Ohio App. LEXIS 5085, 1995 WL 678548, *4 (Ohio Ct. App. 1995)(C.A. No. 17078); *Jones v. Bank One*, 1998 Ohio App. LEXIS 6232, 1998 WL 892245, *2 (Ohio Ct. App. 1998)(No. C-980097); *LoPresti v. TransOhio Sav. Bank*, 1992 Ohio App. LEXIS 2911, 1992 WL 126033, *5 (Ohio Ct. App. 1992)(No. 60667). National Union concedes that it cannot establish that it was legally liable in the underlying lawsuits, nor can it establish that the settlements in the underlying actions were fair and reasonable. Consequently, National Union concedes that, under Ohio law, it is not entitled to indemnification of the amounts paid in settlement of the underlying actions.

National Union argues nonetheless that, pursuant to the indemnification agreement, it is entitled to $ 748,462.75 in attorney fees incurred in the defense of the underlying actions.[3] National Union argues that, even if the court correctly applied *Globe, supra,* to the recovery of settlement costs, under *Ozko, Inc., supra,* National Union is still entitled to recover attorneys' fee as expenses incurred as "'expenses whatever connected or associated with any such [. . .] claims.'" *Id.* 1995 Ohio App. LEXIS 5085, [WL] at *3. In other words, National Union contends that attorneys' fees are not subject to the *Globe* requirements, and, therefore, the indemnification contract is binding and it is entitled to recover attorney fees and expenses.

The defendants contend that the general rule denying indemnification to joint tortfeasors should be applied in this case and that National Union is not entitled to indemnification under the Distributor Agreement because of Kirby's own wrongful conduct. Furthermore,

the defendants assert that, pursuant to the terms of the indemnification agreement, National Union can only recoup expenses "incurred in defense of claims based solely on "acts or omissions" of the [defendants.]" (Br. of Def., doc. # 62, at 6).

The remaining question before the court therefore is whether National Union may obtain indemnification for expenses incurred in the defense of the underlying actions, notwithstanding its inability to recoup the amounts paid in settlement of those actions. The Ohio Supreme Court declined to answer this Court's certified question on this specific issue. Accordingly, this Court has no choice but to rely on "the opinions of intermediate appellate courts [to] provide the next best indicia of the state's position." *CIT Group/Equip. Fin., Inc. v. New GIFL, Inc.*, 823 F.Supp. 479, 485 (N.D. Ohio 1993) *quoting Matulin v. Village of Lodi*, 862 F.2d 609, 616 (6th Cir. 1988).

"In determining whether an indemnity agreement provides for the indemnification of attorney fees, courts must examine the language used in the agreement." *Motorist Ins. Cos. v. Shields*, 2001 Ohio 2387, 2001 Ohio App. LEXIS 365, 2001 WL 243285, *5 (Ohio Ct. App. 2001).

In determining the scope of an indemnity contract, a court must look to the intent of the parties as it is expressed in the language of the agreement. *Worth v. Aetna Cas. & Sur. Co.*, (1987) 32 Ohio St. 3d 238, 240, 513 N.E.2d 253. A court should interpret all words in "their ordinary and popular sense." *Id.*, at 240. When a writing employs clear, precise, and unambiguous terms,

a court should give it that "meaning which [the words] naturally present." *Id.*, at 240-241.

Ozko, Inc., supra at *3. *See also Rubbermaid, Inc. v. Massey Constr., Inc.*, 42 F.3d 1389, *3 (6th Cir. 1994)(Table, Text in Westlaw, NO. 93-6014). *See also Associated Maint. & Roofing Co. v. Rockwell Int'l Corp.*, 1994 Ohio App. LEXIS 1526, 1994 WL 109003, *3 (Ohio Ct. App. 1994).

In this case, the indemnification clause in the contract provides that:

. . . the Distributor shall indemnify the Company, its employees, agents and servants and hold the Company and its said employees, agents, and servants harmless from *any and all liability, damage or expense incurred by it* in connection with *any claim, demand or suit based on Distributor's acts or omissions, including alleged negligence;* provided, however, that the Company shall (1) give Distributor prompt written notice of any such claim, demand or suit, and (2) provide the Distributor with every reasonable assistance which the Distributor may request in resisting such claim, demand or suit. The foregoing shall not apply if the Company is found guilty of any negligence, misconduct or wrongdoing in connection with any such claim, demand or suit.

(emphasis added).

By its terms, the agreement plainly contemplates indemnification of expenses incurred as the result of "any claim, demand or suit" based on any act or omission by the defendants including any alleged

negligence. Under Ohio law, the term 'expenses' includes attorney fees. *Auber v. Marc Glassman, Inc.*, 2002 Ohio 2749, 2002 WL 1265589, *3 (Ohio Ct. App. 2002)(NO. 80283)("The words "any other expenses" should be given their plain meaning and must therefore include all expenses arising out of the incident including attorneys fees and other associated expenses."); *Gen. Accident Fire & Life Assurance Corp. Ltd. v. Smith & Oby Co.*, 272 F.2d 581, 586, 84 Ohio Law Abs. 116 (6th Cir. 1959)("The indemnity agreement provides for the payment of expenses and it seems obvious that liability on the agreement carries with it costs and attorney fees as well as the amount of settlement."). Accordingly, the court concludes that the indemnification agreement contemplates the reimbursement of attorney fees.

The defendants argue that the indemnification agreement only requires payment of expenses "incurred in defense of claims based solely on "acts or omissions" of the [defendants.]" (Br. of Def., doc. # 62, at 6). The court disagrees. A plain reading of the agreement does not limit indemnification to claims based *solely* on the defendants' actions. The parties could have limited the agreement to claims based solely on the acts or omissions of the defendants. However, in this case, there is simply no language suggesting that the parties made that choice, and there definitely is no express language establishing that limitation. "[A] party wishing to narrow an indemnification clause to third-party damage is obligated to limit the scope of the clause expressly; and absent such express limitation, indemnification clauses may apply to damage suffered by the contracting parties themselves." *Battelle Mem'l Inst. v. Nowsco Pipeline Servs., Inc.* 56 F.Supp.2d 944, 951 (S.D. Ohio 1999).

The indemnification agreement limits reimbursement but only to those circumstances in which Kirby was "found guilty of any negligence, misconduct or wrongdoing in connection with any such claim, demand or suit." Thus, it is plain that the parties knew how to construct a limitation on indemnification liability when they wanted to do so. The absence of express words limiting indemnification for expenses is dispositive. [4]

"When an indemnitor expressly agrees to indemnify an indemnitee except in certain specified circumstances, and it is determined that the exceptions do not pertain, the indemnitor is obligated to indemnify the indemnitee under the terms of the agreement." *Worth*, 513 N.E. at 256. *See also Allen v. Standard Oil Co.*, 2 Ohio St. 3d 122, 2 Ohio B. 671, 443 N.E.2d 497, 500 (Ohio 1982). Accordingly, the court concludes that National Union is entitled to an award of reasonable attorney's fees in accordance with the indemnification contract.

Under Ohio law, "the award of attorney fees is to be a reasonable amount determined by the trial court upon presentation of sworn evidence." *Pyle v. Pyle*, 11 Ohio App. 3d 31, 11 Ohio B. 63, 463 N.E.2d 98, 104-105 (Ohio Ct. App. 1983). *See also Meacham v. Miller*, 79 Ohio App. 3d 35, 606 N.E.2d 996, 1000 (Ohio Ct. App. 1992). However, the court does not have before it any evidence supporting National Union's claim for $ 748,462.75 in fees or whether National Union's request for fees in the amount of $ 748,462.75 is reasonable under the circumstances. "In order to allow an award of attorney fees, there must be evidence concerning the proper measure of such fees." *Auber*, 2002 Ohio 2749, 2002 WL 1265589 at 3.

The factors to consider when awarding attorney fees are "'* * * (1) the time and labor involved in maintaining * * * [the] litigation, (2) the novelty, complexity, and difficulty of the questions involved, (3) the professional skill required to perform the necessary legal services, (4) the experience, reputation, and ability of the attorneys, and (5) the miscellaneous expenses of * * * [the] litigation.'" *Hutchinson, supra,* 17 Ohio St.3d at 200, 17 OBR at 437, 478 N.E.2d at 1005, citing *State ex rel. Montrie Nursing Home v. Creasy* (1983), 5 Ohio St. 3d 124, 128, 5 OBR 258, 262, 449 N.E.2d 763, 767. Additional factors to consider are "the fee customarily charged in the locality for similar legal services" and "the amount involved and the results obtained." DR 2 -- 106(B), Code of Professional Responsibility. Also, there must be evidence presented at trial concerning the proper measure of attorney fees in order to allow an award. *Hutchinson, supra.*

Villella v. Waikem Motors, Inc., 45 Ohio St.3d 36, 41, 543 N.E.2d 464, 470 (Ohio 1989); *Pyle, supra.* Consequently, while the court concludes National Union is entitled to an award of reasonable attorney's fees in accordance with the indemnification contract, the court is without sufficient evidentiary basis to determine what constitutes a reasonable attorney fee.

CONCLUSION

Accordingly, before proceeding further, the parties are

ORDERED, not later than sixty (60) days from the date of this order, to engage in good faith negotiations, including mediation if the parties so choose, regarding what, constitutes a reasonable attorney fee in this

matter. The parties shall report the results of the good faith negotiations within seven (7) days of the conclusion of the negotiations. It is further

ORDERED that National Union's request for indemnification for the amounts of the settlements in the underlying state court actions be and is hereby DENIED. Upon the resolution of the attorney fees' issue, the court will enter a final judgment.

Done this 9th day of March, 2006.

/s/ CHARLES S. COODY

CHIEF UNITED STATES MAGISTRATE JUDGE

Footnotes

1 Pursuant to a choice-of-law provision in the distributor agreement, this Court determined Ohio law to be controlling law.

2 The undisputed evidence demonstrates that Kirby had no involvement in the financing of the vacuums. As Cavins testified:

All the choices about outside financing, including which companies to use or recommend to our customers, are made solely by myself on behalf of Progressive. Specifically the decision to use [American Direct Credit LLC ("ADC")] as a source for consumer financing of vacuum cleaner sales was made entirely by me and without any involvement by [Kirby]. There are many other financing companies from which I could have chosen, but which I did not choose, because I preferred

ADC and recommended them to my fellow Distributors. The selection of ADC was solely made by me alone, and [Kirby] had no involvement in that decision whatsoever, nor in any of the transactions in which ADC financing was obtained.

In addition, Kirby did not offer any financing options to its distributors for use with consumer purchasers. Cavins testified as to this fact as follows:

Progressive's sales representatives are authorized, trained and equipped by Progressive to offer assistance to customers in financing their purchases. For this purpose, Progressive has sought and obtained its own contacts in the financing industry including, in the past, [ADC]. Progressive's sales representatives have been authorized by me alone to assist customers in making credit card applications to ADC for the issuance of a MasterCard or Visa credit card in order to charge their purchase. The Kirby Company is not, and never has been, a party to those transactions and it has no knowledge or control over selection of outside financing.

3 Kirby assigned its right to pursue indemnity under the Distributor's Agreement to National Union.

4 Although the defendants continue to argue that Kirby was guilty of misconduct, in accordance with Ohio law, the court must give the all terms in the agreement "their ordinary and popular sense." Worth, 513 N.E. at 256; Ozko, Inc., supra 1995 Ohio App. LEXIS 5085, [WL] at *3. The defendants have presented no evidence that Kirby was "found guilty of misconduct." (emphasis added). Accordingly, the court concludes that this

express limitation on indemnification does not apply under the facts of this case.

4/23/07

No. 06-13361

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NATIONAL UNION FIRE INSURANCE COMPANY,

Plaintiff-Appellee,

versus BILL G. CAVINS,

Defendant-Appellant,

VIRGINIA CAVINS, PROGRESSIVE SYSTEMS, INC.,

Defendants,

COLORADO CASUALTY INSURANCE COMPANY, Interested Party-Appellant.

ORDER

The Petition(s) for Rehearing are DENIED and no Judge in regular service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are Denied.